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In the Supreme Court of the United States

OCTOBER TERM, 1997

HUMANA INC., ET AL., PETITIONERS

v.

MARY FORSYTH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The McCarran-Ferguson Act states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b). The question presented is whether the McCarran-Ferguson Act precludes a private party from bringing suit under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c) (Supp. I 1995), to obtain a federal remedy for a pattern of fraud allegedly perpetrated by a medical insurer.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Ambrose v. *Blue Cross & Blue Shield*, 891 F. Supp. 1153 (E.D. Va. 1995), aff'd, 95 F.3d 41 (4th Cir. 1996)	14-15
California v. *ARC America Corp.*, 490 U.S. 93 (1989)	11
Department of Treasury v. *Fabe*, 508 U.S. 491 (1993)	1-2
Doe v. *Norwest Bank Minnesota, N.A.*, 107 F.3d 1297 (8th Cir. 1997)	8, 11, 12, 20
Everson v. *Blue Cross and Blue Shield*, 898 F. Supp. 532 (N.D. Ohio 1994)	9, 12
Florenzano v. *Olson*, 387 N.W.2d 168 (Minn. 1986)	12
Kenty v. *Bank One, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996)	8, 11, 12, 13
Mackey v. *Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984)	15
Merchants Home Delivery Serv., Inc. v. *Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir.), cert. denied, 516 U.S. 964 (1995)	7, 8, 9, 10, 20
Morris v. *American Family Mut. Ins. Co.*, 386 N.W.2d 233 (Minn. 1986)	9
NAACP v. *American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993)	8, 10, 11, 15, 16
Nationwide Mut. Ins. Co. v. *Cisneros*, 52 F.3d 1351 (6th Cir. 1995), cert. denied, 516 U.S. 1140 (1996)	12

Cases—Continued: Page

Paul v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869) 1
Pioneer Chlor Alkali Co. v. *National Union Fire Ins. Co.*, 863 F. Supp. 1237 (D. Nev. 1994) 9, 19
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946) 2
Sabo v. *Metropolitan Life Ins. Co.*, 137 F.3d 185 (3d Cir. 1998) 9, 10, 13, 14, 16
Securities and Exchange Commission v. *National Securities, Inc.*, 393 U.S. 453 (1969) 14
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 3
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 10
United States v. *Blumeyer*, 114 F.3d 758 (8th Cir.), cert. denied, 118 S. Ct. 350 (1997) 18
United States v. *Cavin*, 39 F.3d 1299 (5th Cir. 1994) 18
United States v. *Employee Ins. Servs.*, Civ. No. 1-93-CV-181 (N.D. Ga., Complaint filed Jan. 27, 1989) 17
United States v. *Palumbo Bros.*, No. 96 CR 613 (N. D. Ill. Oct. 9, 1997), rev'd, No. 97-3807, 1998 WL 224892 (7th Cir. May 7, 1998) 18, 19
United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 1
United States v. *Sylvanus*, 192 F.2d 96 (7th Cir. 1951), cert. denied, 342 U.S. 943 (1952) 18-19
Villafane-Neriz v. *FDIC*, 75 F.3d 727 (1st Cir. 1996) 10
Wiltsey v. *Fireman's Fund Ins. Co.*, No. C0-94-235, 1994 WL 306330 (Minn. Ct. App. Aug. 2, 1994) 12

Constitution and statutes:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) 10
Civil False Claims Act, 31 U.S.C. 3729 *et seq.* 17

Statutes—Continued: Page

Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.* 6
McCarran-Ferguson Act, § 2(b), 15 U.S.C. 1012(b) . 1, 2, 7
Medicare Act, Tit. I, 42 U.S.C. 1395 *et seq.* 17
42 U.S.C. 1395*l* 17
42 U.S.C. 1395m 17
42 U.S.C. 1395u 17
42 U.S.C. 1395dd 17
42 U.S.C. 1396b 17
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (Statement of Findings and Purpose) 2
Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801 *et seq.* 17
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* 2
18 U.S.C. 1961(1) 3
18 U.S.C. 1961(3) 5
18 U.S.C. 1961(4) 5
18 U.S.C. 1962(c) 3, 16
18 U.S.C. 1963 3
18 U.S.C. 1964(a) 3
18 U.S.C. 1964(b) 3
18 U.S.C. 1964(c) (Supp. I 1995) 1, 3
Social Security Act, Tit. XI, 42 U.S.C. 1301 *et seq.*:
42 U.S.C. 1320a-7 17
42 U.S.C. 1320a-7a 17
42 U.S.C. 1320c-5 17
18 U.S.C. 1345 17
Nev. Rev. Stat. (1997):
§ 686A.015 6
§ 686A.310.1(a) 19
§ 686A.310.2 19

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

The dispute in this case centers on whether the McCarran-Ferguson Act, 15 U.S.C. 1012(b), precludes a private litigant from seeking the civil remedies available under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(c) (Supp. I 1995), where the lawsuit alleges fraudulent conduct by a medical insurer.

1. Prior to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), it generally had been assumed that "[i]ssuing a policy of insurance [wa]s not a transaction of commerce," *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869), and consequently that federal law did not apply to the business of insurance. *Department of Treas-*

ury v. *Fabe*, 508 U.S. 491, 499 (1993). In *South-Eastern Underwriters*, however, the Court held that an insurance company doing business across state lines was engaged in interstate commerce and was therefore subject to federal antitrust laws. Because that decision prompted concerns that federal law might be applied in a way that could damage "existing and future state systems for regulating and taxing the business of insurance," *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 429 (1946), Congress in 1945 enacted the McCarran-Ferguson Act.

Among other things, the McCarran-Ferguson Act creates a special rule of statutory construction designed to prevent inadvertent federal preemption or impairment of state insurance law. In particular, Section 2(b) of the Act declares:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance.

15 U.S.C. 1012(b). As this Court has explained, Section 2(b) is designed to "remov[e] obstructions" to state insurance regulation "which might be thought to flow from [Congress's] own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." *Prudential*, 328 U.S. at 429-430.

2. Twenty-five years after passage of the McCarran-Ferguson Act, Congress enacted the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* See Organized Crime Control Act of 1970, Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 923. In relevant part, RICO makes it unlawful for "any person employed by or

associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). Racketeering activity includes "any act 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 481 (1985); see 18 U.S.C. 1961(1).

The United States may bring criminal charges or initiate civil proceedings against RICO violators. See 18 U.S.C. 1963 (criminal penalties), 1964(a), (b) (civil proceedings by the Attorney General). In addition, RICO provides a private right of action under which "[a]ny person injured in his business or property by reason of a violation of" RICO may bring suit to recover "threefold" the damages sustained plus "the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. 1964(c) (Supp. I 1995).

3. Respondents are certain beneficiaries of group health insurance policies issued by petitioner Humana Health Insurance of Nevada (Humana Insurance), and the employer-purchasers who paid the premiums for those policies. Pet. App. 2a. Under the health insurance policies, Humana Insurance was obligated to pay 80% of the beneficiary's hospital charges over and above a designated deductible amount; the beneficiary was to pay the remaining 20% as a co-payment. *Ibid.* Respondents allege that, beginning in 1985, petitioners engaged in a massive fraud to shift payment obligations from themselves to policy beneficiaries.

In particular, respondents charge that Humana Insurance and Humana Sunrise Hospital (Sunrise Hos-

pital) (an acute care facility in Nevada owned and operated by petitioner Humana, Inc.) entered into a secret arrangement under which Humana Insurance obtained discounts of between 40% and 96%. Pet. App. 2a-4a, 43a. According to respondents, the entire discount was credited toward Humana Insurance's 80% obligation. *Id.* at 3a-4a, 43a. Policy beneficiaries, in contrast, continued to be billed for their co-payments as though Sunrise Hospital were charging the full, undiscounted rate. *Id.* at 3a-4a. As a result, those making co-payments were misled into paying far more than 20%, and Humana Insurance paid far less than 80%, of total charges. *Id.* at 2a, 4a. For example, Humana Insurance might receive an 89% discount on a hospital bill of $5,000, and thus pay just $550 (11% of $5,000). The co-payor, however, would pay 20% of the undiscounted rate of $5,000, or a total of $1,000. See *id.* at 57a. Thus, of the $1,550 charged by Sunrise Hospital, $1,000 or nearly 65% would be paid by the policy beneficiary, while only $550 or just over 35% would be paid by Humana Insurance. Under respondents' understanding of the co-payment provision, co-payors should have paid just 20% of total charges, or $310, and Humana should have paid 80% of total charges, or $1,240. *Ibid.*

4. Respondents brought suit in the United States District Court for the District of Nevada, seeking recovery under several causes of action, including RICO. The policy beneficiaries, respondents asserted, had been economically injured by a pattern of racketeering activity in the form of mail, wire, radio, and television fraud, which had deceived them into making excessive co-payments. Pet. App. 20a-21a.[1]

[1] Respondents alleged that petitioners had concealed and misrepresented the secret agreement with Sunrise Hospital in numerous mailings, television and radio commercials, and telephone calls soliciting business, Pet. App. 21a; that petitioners concealed the discount arrangement by having Humana Insurance write checks to Sunrise Hospital for 80% of the undiscounted charges and having Sunrise Hospital remit the discount to Humana Insurance through monthly intercompany transfers, in what respondents characterized as a "classic kickback scheme," *id.* at 4a; and that such acts were intended to deceive and mislead co-payors into paying more than 20% of actual charges. To satisfy the "enterprise" element of RICO, respondents asserted that petitioners Humana, Inc., and Humana Insurance together constituted an "association in fact" enterprise conducted by each of the petitioners or, in the alternative, that Humana, Inc., a "person" within the meaning of 18 U.S.C. 1961(3), associated with Humana Insurance, an "association" within the meaning of 18 U.S.C. 1961(4). Pet. App. 21a.

Although respondents also asserted injury to the employer-purchasers of the policies, *id.* at 4a, those RICO claims are no longer part of this case.[2]

The district court granted petitioners' motion for summary judgment on the RICO claims, holding them precluded by the McCarran-Ferguson Act. Pet. App. 21a, 91a-96a. The McCarran-Ferguson Act, the district court ruled, precludes the application of a federal statute if (1) the statute does not "specifically relate[]" to the business of insurance, (2) the acts challenged under the statute constitute the business of insurance, (3) the State has enacted a law or laws regulating the business of insurance, and (4) the state law would be superseded, impaired, or invalidated by the application of the federal statute. *Id.* at 91a-92a. After concluding that the first three factors were

[2] The district court granted summary judgment for petitioners on those claims because of a lack of causation, Pet. App. 21a, 86a-87a, 89a-90a, and the court of appeals affirmed, *id.* at 26a-28a, 30a. Respondents have not sought review of those decisions.

satisfied, the court noted that Nevada has a comprehensive regulatory scheme addressing insurance trade practices and frauds. *Id.* at 93a-94a. Under that scheme, the Nevada Commissioner of Insurance has "exclusive jurisdiction in regulating the subject of trade practices in the business of insurance." Nev. Rev. Stat. § 686A.015 (1997) (quoted at Pet. App. 93a). Because RICO's private remedies, including its treble damages provision, far exceed the penalties prescribed by Nevada for the same conduct, the court concluded that application of federal law in this case would "invalidate, impair, or supersede" Nevada insurance law: "For this Court to allow [respondents] to pursue the harsher RICO penalties for behavior which the Nevada Legislature apparently did not deem worthy of such penalties, would be tantamount to allowing Congress to intercede in an area expressly left to the [S]tates under the McCarran-Ferguson Act." *Id.* at 95a.[3]

[3] The district court also granted summary judgment on several other claims. First, it granted summary judgment in favor of respondents on their claim under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.* Pet. App. 10a, 54a-58a. The court, however, limited the amount of damages respondents could recover. *Id.* at 21a, 90a-91a (precluding the award of "damages in excess of the amount that they could have recovered under a proper interpretation of the co-payment provision."). Second, the court granted petitioners' motion for summary judgment on respondents' antitrust claims. *Id.* at 66a-80a. The grant of summary judgment in favor of respondents on the ERISA claims was not appealed; the grant of summary judgment on damages in favor of petitioners was affirmed on appeal, *id.* at 10a-11a; and the grant of summary judgment in favor of petitioners on the antitrust claims was reversed, *id.* at 11a-20a. None of those decisions, however, has been challenged in this Court.

5. The court of appeals reversed in relevant part, disagreeing with the district court's conclusion that the application of RICO would impair Nevada's regulatory scheme. Relying on its decision in *Merchants Home Delivery Service, Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486, cert. denied, 516 U.S. 964 (1995), the court explained that the McCarran-Ferguson Act precludes the application of federal law in the area of insurance only if the federal law would conflict with state law. Pet. App. 25a. The mere existence of overlap in the coverage of Nevada insurance law and RICO, it held, "does not create a conflict between federal and state law" since neither law prohibits conduct that the other would permit. *Ibid.*

DISCUSSION

Because the federal appellate courts are divided on an important issue of statutory construction—the meaning of the phrase "invalidate, impair, or supersede" in the McCarran-Ferguson Act—a grant of certiorari to resolve the conflict would be appropriate. This case presents an adequate, although less-than-ideal, vehicle for so doing.

1. Section 2(b) of the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b). Because RICO does not "specifically relate[] to the business of insurance," federal courts repeatedly have been required to address whether permitting RICO actions alleging insurance fraud would "invalidate, impair, or supersede" state insurance law.

The Ninth Circuit has twice answered that question in the negative. In *Merchants Home Delivery*

Service, Inc. v. *Hall*, 50 F.3d 1486, cert. denied, 516 U.S. 964 (1995), the court held that permitting private parties to pursue a RICO action for insurance fraud would not invalidate, impair, or supersede California insurance law. Relying on the Seventh Circuit's decision in *NAACP* v. *American Family Mutual Ins. Co.*, 978 F.2d 287 (1992), cert. denied, 508 U.S. 907 (1993), the Ninth Circuit concluded that "state and federal laws proscribing identical conduct do not conflict with or displace each other, and may coexist under the McCarran-Ferguson Act," even if federal law offers greater remedies. 50 F.3d at 1492. And in this case, the Ninth Circuit reached the same conclusion. Pet. App. 25a.

The Sixth and Eighth Circuits have reached contrary results. In *Doe* v. *Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1306-1308 (1997), the Eighth Circuit held that RICO's provision of remedies beyond those offered under state law would "frustrate, and perhaps even supplant, Minnesota's carefully developed scheme of [insurance] regulation." *Id.* at 1308. Likewise, in *Kenty* v. *Bank One, Columbus, N.A.*, 92 F.3d 384, 392-393 (1996), the Sixth Circuit concluded that the "different liability under [RICO and] Ohio law for violations, as well as different standards of proof * * * means that RICO does impair the ability of Ohio to regulate" deceptive or fraudulent insurance practices.

These divergent results cannot be entirely explained by reference to differences in the pertinent state insurance laws. In each of the cases, the insurance laws and the common law appear to prohibit the very conduct prohibited by RICO; the primary difference is that state law provides more limited remedies.[4] Consequently, the divergent results appear to be the product of differing—indeed, irreconcilable—interpretations of the McCarran-Ferguson Act and the terms "invalidate, impair, or supersede" in particular. As the Third Circuit recently noted: "Court of Appeals jurisprudence is in disarray as to the extent and meaning of invalidate, impair, or supersede under the Act." *Sabo* v. *Metropolitan Life Ins. Co.*, 137 F.3d 185, 193 (1998).

a. Under the reasoning of the First, Seventh, and Ninth Circuits, federal law generally does not "in-

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[4] This is not to say that there are no differences among the relevant state insurance laws. Those differences, however, do not appear to have influenced the results in these cases. For example, Nevada has recognized a private right of action under some of its insurance laws, while Minnesota and Ohio have not. Compare *Pioneer Chlor Alkali Co.* v. *National Union Fire Ins. Co.*, 863 F. Supp. 1237, 1241 (D. Nev. 1994), with *Morris* v. *American Family Mutual Ins. Co.*, 386 N.W.2d 233, 238 (Minn. 1986); *Everson* v. *Blue Cross and Blue Shield*, 898 F. Supp. 532, 544 (N.D. Ohio 1994). This distinction, however, cannot explain the division in authority because the Ninth Circuit in this case assumed that Nevada insurance law—like the insurance laws of Ohio and Minnesota—did not provide a private right of action. Pet. App. 25a. Moreover, the conflict between *Kenty* and *Doe* on the one hand and the Ninth Circuit's earlier decision in *Merchants Home* on the other cannot be reconciled based on differing availability of private enforcement mechanisms because the California insurance code provisions at issue in *Merchants Home*, like the laws of Ohio and Minnesota at issue in *Kenty* and *Doe*, "allow[ed] only administrative enforcement." *Merchants Home*, 50 F.3d at 1491. Finally, there is little reason why the availability of a private right of action under a State's insurance laws should be thought to make a difference, especially if the State continues to permit victims of insurance fraud to pursue common-law fraud actions outside of the administrative process in state court, as California, Minnesota, Nevada, and Ohio all do.

validate, impair, or supersede" state insurance law absent a direct conflict between the substantive provisions of the federal and state statutes at issue. See *Merchants Home*, 50 F.3d at 1492 (federal statutes "apply unless they conflict with the states' statutes"); *Villafane-Neriz* v. *FDIC*, 75 F.3d 727, 736 (1st Cir. 1996) ("[i]n the absence of a direct prohibition, we refuse to hold that there has been an impairment" of state insurance regulations); *American Family*, 978 F.2d at 295-297 ("state and federal rules that are substantively identical but differ in penalty do not conflict with or displace each other"); see *Sabo*, 137 F.3d at 193 ("One line of cases, spearheaded by the first, seventh and ninth circuit Courts of Appeals, looks to a direct conflict in the substantive provisions of the federal and state statutes at issue.").

These courts reason that the McCarran-Ferguson Act in effect creates a form of reverse preemption in order to avoid inadvertent federal interference with state insurance regulation. See *American Family*, 978 F.2d at 296 ("The McCarran-Ferguson Act is a form of inverse preemption."); *Merchants Home*, 50 F.3d at 1492 (same). Based on this analogy to Supremacy Clause preemption, the First, Seventh, and Ninth Circuits have concluded that "principles defining when state remedies conflict with (and so are preempted by) federal law are pertinent in deciding when federal rules 'invalidate, impair, or supersede' state rules." 978 F.2d at 296. Because the Supremacy Clause does not generally preclude States from providing additional remedies for conduct that is also prohibited by federal law,[5] these courts have concluded that federal statutes like RICO may provide additional remedies for conduct barred by state law without being displaced by the McCarran-Ferguson Act. As Judge Easterbrook observed in *American Family*, one who asserts that the McCarran-Ferguson Act precludes reliance on federal law "needs to show that the [federal law] conflicts with state law. Duplication is not conflict." 978 F.2d at 295.

[5] See, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) (States may require payment of punitive damages by companies that violate a federal law governing the handling of radioactive waste, even if federal law would otherwise provide less compensation); *California* v. *ARC America Corp.*, 490 U.S. 93 (1989) (state antitrust law may require payment of treble damages to indirect purchasers even though federal antitrust law does not); *American Family*, 978 F.2d at 296 (citing additional cases).

The Ninth Circuit's decisions upholding the availability of RICO remedies in cases involving insurance fraud flow inevitably from this mode of analysis. Neither the California laws at issue in *Merchants Home* nor the Nevada statutes at issue in this case expressly permit—and both expressly prohibit—the sort of criminal insurance fraud necessary to support a RICO claim. Because RICO merely provides supplementary remedies for conduct that is also barred by state insurance law, the Ninth Circuit has concluded that RICO does not "invalidate, impair, or supersede" any California or Nevada law regulating insurance.

b. In contrast, under the analysis of the Eighth Circuit (and to some degree the Sixth Circuit, see note 8, *infra*), a difference in remedies may by itself preclude application of a general federal statute under the McCarran-Ferguson Act. *Doe*, *supra*; *Kenty*, *supra*. This may be true even where there is no conflict between the federal and state laws in their regulation of insurance practices. See, *e.g.*, *Doe*, 107

F.3d at 1307 (federal law inapplicable even though "there is no direct conflict between federal and state law").

In *Kenty* and *Doe*, the courts relied substantially on the facts that Minnesota and Ohio had decided to permit only the insurance commissioner, through administrative action, to enforce their respective insurance laws, and had not provided a treble damages remedy for victims of unlawful insurance practices. See *Doe*, 107 F.3d at 1307; *Kenty*, 92 F.3d at 392, 393. Although private parties remained free in those States to pursue common-law fraud actions in state court,[6] the Sixth and Eighth Circuits concluded that allowing parties to seek vastly greater remedies under RICO might upset the balance established by state insurance regulation—and thus impair it—by leading victims of fraud to pursue RICO actions rather than rely on state-law procedures. *Doe*, 107 F.3d at 1306-1307; *Kenty*, 92 F. 3d at 392.[7] The Sixth

[6] *Everson*, 898 F. Supp. at 544; *Wiltsey* v. *Fireman's Fund Ins. Co.*, No. C0-94-235, 1994 WL 306330 (Minn. Ct. App. Aug. 2, 1994) (unpublished opinion); see *Florenzano* v. *Olson*, 387 N.W.2d 168 (Minn. 1986).

[7] The treble damages and attorney's fees remedies available under RICO appear to have been critical in these decisions. In other cases, those same courts have concluded that reliance on federal statutes that provide additional remedies (such as a private right of action, jury trials, and punitive damages) but that lack a treble damages remedy is consistent with the McCarran-Ferguson Act. See, *e.g.*, *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351 (6th Cir. 1995) (private party may proceed against insurer under Fair Housing Act even though the Act, unlike Ohio insurance law, provides a private remedy, permits jury trials, and allows for punitive damages), cert. denied, 516 U.S. 1140 (1996); *Doe*, 107 F.3d at 1307 (notwithstanding its holding that RICO claims are barred by McCarran-Ferguson, court might agree with the Sixth and

and Eighth Circuits therefore held that private actions under RICO are, in Minnesota and Ohio, precluded by the McCarran-Ferguson Act.[8]

c. The Third Circuit too has addressed this issue, but did not decide the extent to which "different federal and state remedies could ever" cause a federal statute to "impair" state insurance law. *Sabo*, 137 F.3d at 195. Like the First, Seventh, and Ninth Circuits, the Third Circuit agreed that a "direct conflict in the substantive provisions of RICO with those provided for [by state law] would fall within the ambit of laws that invalidate, impair, or supersede state

Seventh Circuit's decisions that the Fair Housing Act is consistent with McCarran-Ferguson).

[8] To some degree, the Sixth Circuit's opinion in *Kenty* may be read as supporting the actual-conflict standard articulated by the First, Seventh, and Ninth Circuits. For example, the *Kenty* opinion states that "[a] party seeking to invoke McCarran-Ferguson cannot simply point to additional procedural measures included in a federal law without identifying some substantive aspect of the state law that is being invalidated, impaired, or superseded." 92 F.3d at 392. Moreover, the court purported to identify such a substantive difference in *Kenty* itself: "Ohio law," the court noted, "may employ a different standard than * * * RICO to determine when a 'misrepresentation' violates its statute. * * * By holding insurance companies liable under a federal law, such as RICO, when Ohio law provides for no liability, RICO would impair the regulatory framework within which Ohio expects its insurance companies to do business." *Ibid.* In our view, that reasoning does not explain the result in *Kenty*, which appears instead to turn on RICO's treble damages provision. After all, Ohio law permits common-law fraud actions in insurance cases, see note 6, *supra*, under a standard of conduct that is no more permissive than the standard used in RICO mail-fraud actions. If Ohio common law bars the same misrepresentations that RICO does, it cannot be said that RICO provides for liability where Ohio law does not.

insurance law." *Id.* at 194. But it found no such contradiction in the case before it because Pennsylvania insurance law did not expressly permit or require any conduct that RICO would prohibit. *Ibid.*

In addition, the court found no evidence that a difference in the remedies offered under RICO and those available under state insurance law would indirectly impair state law, even assuming arguendo that such an indirect impairment could trigger application of the McCarran-Ferguson Act. Echoing this Court's analysis in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453 (1969), the court noted that RICO's purpose of allowing a liberal federal remedy to those who have been victimized by organized crime is not inconsistent with the purpose of Pennsylvania's insurance laws, which is to regulate trade practices by defining the practices that constitute unfair competition, unfair treatment of customers, or deception. Similarly, the court was not persuaded that allowing RICO actions would somehow undermine, "in a more abstract sense, Pennsylvania's overall implementation of insurance norms and its decision to enforce certain insurance violations in an administrative context." 137 F.3d at 195. To the contrary, because "[p]rivate actions for fraud and deceit in the insurance business coexist with [state insurance law] even though the same conduct may be covered by both the common law and [state insurance law]," the court saw "no reason why a federal private right of action cannot [also] coexist with" state insurance law. *Ibid.*[9]

[9] As petitioners also point out, the Fourth Circuit in an unpublished decision has upheld a district court order holding that the McCarran-Ferguson Act bars reliance on civil RICO in the insurance context in Virginia. *Ambrose* v. *Blue Cross & Blue Shield*, 891 F.Supp. 1153, 1164-1168 (E.D. Va. 1995), aff'd, 95 F.3d 41 (1996) (Table). It is unclear whether that unpublished decision represents the law of the Fourth Circuit, as the Fourth Circuit's published decision in *Mackey* v. *Nationwide Insurance Cos.*, 724 F.2d 419 (1984), suggests that the Fourth Circuit might align itself not with the Sixth and Eighth Circuits but rather with the First, Seventh, and Ninth. See 724 F.2d at 421 & nn. 1-2 (declining to find impairment absent a direct conflict between state insurance law and federal Fair Housing Act requirements).

2. In our view, the Eighth and Sixth Circuits' analyses are flawed. As Judge Easterbrook explained in *American Family*, anyone asserting that the McCarran-Ferguson Act precludes the application of federal law must identify the "state law regulating the business of insurance" that the federal law would "invalidate, impair, or supersede." 978 F.2d at 295; see *Mackey* v. *Nationwide Ins. Cos.*, 724 F.2d 419, 421 (4th Cir. 1984) (individual relying on McCarran-Ferguson must "point[] to [a] law enacted by [the State] which would be 'impaired' by application" of federal law). "The presence of a general regulatory scheme" addressing insurance, like the regulatory regimes identified in *Doe* and *Kenty*, "does not show that any particular state law would be invalidated, impaired, or superseded." *Mackey*, 724 F.2d at 421. To the contrary, if federal law and state law both prohibit the same conduct, RICO's additional remedies at most enhance the vindication of state norms. Nor can it be said that RICO's additional remedies supplant reliance on state remedial schemes, as RICO reaches only a small subset of state insurance-law infractions. Its greater remedies may be invoked only in exceptional cases where the elements of a RICO violation can be proved—cases in which the defendant has not merely committed a tort or regulatory violation, but

instead has demonstrated extreme culpability by operating an "enterprise" through a "pattern" of indictable criminal activity. 18 U.S.C. 1962(c).[10]

The ordinary, and eminently sensible, presumption is that a federal law of general applicability, such as RICO, applies uniformly to all persons whose conduct falls within the statutory proscription. Under our system of equal justice under law, this is true regardless of the particular factual context or the particular State in which the conduct occurs, so long as Congress does not exceed its constitutional powers. The rule of statutory construction prescribed by the McCarran-Ferguson Act should not be distorted to create disuniformities in the application of other Acts of Congress in the absence of a showing that the particular disuniformity is indeed required to prevent a state law "regulating the business of insurance" from actually being "invalidate[d], impair[ed], or supersede[d]." No such showing has been made here.

3. This case raises issues of substantial importance to the United States. Although we are not

[10] Even if one were to assume that RICO, by "increasing the probability that a state norm will be vindicated (or augmenting the damages assessed in the event of violation)," might be said to conflict with a state policy "that remedies should be limited or rare," *American Family*, 978 F.2d at 295, few if any States have articulated such a low- or no-enforcement policy with appropriate clarity. To the contrary, States almost uniformly permit common-law fraud actions—which can result in jury trials and punitive damages awards—to co-exist with their insurance regulations. If such "[p]rivate actions for fraud and deceit in the insurance business coexist with" state insurance laws even though "the same conduct may be covered by both," there is "no reason why a federal private right of action" under RICO cannot "coexist" with state insurance law as well. *Sabo*, 137 F.3d at 195.

aware of any instance in which the United States has brought a civil RICO action in the insurance area, the United States routinely prosecutes criminal activity in the business of insurance under RICO and other federal criminal statutes, and has in the past obtained civil injunctions under 18 U.S.C. 1345 to bar the operation of insurance-related entities engaged in fraud. See, *e.g.*, *United States* v. *Employee Ins. Servs.*, Civ. No. 1-93-CV-181 (N.D. Ga., Complaint filed Jan. 27, 1989) (civil action brought with cooperation of state regulators to enjoin fraudulent activity involving collection of premiums).[11]

The United States thus has a strong interest in ensuring that the McCarran-Ferguson Act is not interpreted in a manner that would interfere with its ability to enforce RICO and other federal statutes against criminals operating in the insurance arena where federal law does not conflict with the norms established by state insurance law. The questions whether the government may bring a civil or criminal action consistent with the McCarran-Ferguson Act, and whether a private party may bring a suit for

[11] Although the Health Care Financing Administration (HCFA) of the Department of Health and Human Services (HHS) may in some instances encounter insurance fraud issues in its administration and enforcement of the Medicare Act, 42 U.S.C. 1395 *et seq.*, that Act provides its own remedies for fraudulent billing by medical providers. See, *e.g.*, 42 U.S.C. 1320a-7, 1320a-7a, 1320c-5, 1395*l*, 1395m, 1395u, 1395dd, 1396b. (Additional remedies for fraud can be found under 31 U.S.C. 3729 *et seq.*, and 31 U.S.C. 3801 *et seq.*) The Inspector General of HHS also investigates fraud in the Medicare program but likewise has relied on Medicare Act remedies. Reliance on those remedies, because they specifically relate to the business of insurance, obviously is not precluded by the McCarran-Ferguson Act.

treble damages, however, are informed by different considerations.[12] As a result, courts have held that the United States can proceed under RICO consistent with the McCarran-Ferguson Act even if a private party cannot.[13] Nonetheless, because of the

[12] As the Seventh Circuit recently explained: "[T]here are fundamental differences between a private individual as a plaintiff and the government as a civil litigant in RICO claims. * * * The government seeks to vindicate public harm and to protect the public from systematic and pervasive criminal activities while the individual seeks to enforce private rights in a civil RICO cause of action. Therefore, a test used by courts to determine whether a civil RICO claim [is barred by the operation of another federal statute] does not translate into a valid indicator that [the same federal statute] would also [preclude] the prosecution of a criminal RICO offense." *United States* v. *Palumbo Bros.*, No. 97-3807, 1998 WL 224892, at *19 (May 7, 1998). Moreover, while state law often may give private parties other means to vindicate their interests, it often does not afford the national government a means for vindicating the public's interest in law enforcement. It is highly unlikely that Congress intended "that the government not have the ability to protect the general public from crime and to vindicate public harm for racketeering activities," *ibid.*, simply because the racketeering happens to arise in the insurance context.

[13] See *United States* v. *Blumeyer*, 114 F.3d 758, 768 (8th Cir.) (although private action is barred by McCarran-Ferguson Act, criminal RICO prosecution is not barred because fear that "wronged policyholders would turn to RICO suits instead of pursuing administrative channels of relief * * * is simply inapplicable" to criminal actions), cert. denied, 118 S. Ct. 350 (1997); see also *United States* v. *Cavin*, 39 F.3d 1299, 1305 (5th Cir. 1994) (because State's regulatory interests and federal interest in prosecuting fraud are "completely compatible," the McCarran-Ferguson Act does not bar prosecution under federal law); *United States* v. *Sylvanus*, 192 F.2d 96, 100 (7th Cir. 1951) (criminal mail fraud prosecution based on insurance

potential effect on federal law enforcement, cf., *e.g.*, *United States* v. *Palumbo Bros.*, No. 96 CR 613 (N.D. Ill. Oct 9, 1997) (order dismissing indictment), rev'd, No. 97-3807, 1998 WL 224892, at *19 (7th Cir., May 7, 1998), and because the ability of individuals to pursue federal remedies for criminal conduct may depend not on the substance of state insurance law or federal statutory requirements, but rather on the circuit in which their case happens to arise, the question presented in this case warrants the Court's plenary attention.

4. There is nonetheless one respect in which this case is not an ideal vehicle for consideration of this question. As noted above, the Ninth Circuit's conclusion that Nevada insurance law "provides for only administrative remedies," Pet. App. 25a, may be partially incorrect. See note 4, *supra*. In fact, Nevada permits private litigants to seek judicial redress through private actions brought directly under some provisions of its insurance laws. See *Pioneer Chlor Alkali Co.* v. *National Union Fire Ins. Co.*, 863 F. Supp. 1237, 1243 (D. Nev. 1994) ("NRS 686A.310 expressly provid[es] insureds with a private cause of action.").[14] To the extent the results in *Doe* and *Kenty* are predicated on the absence of a private right of action under Minnesota's and Ohio's insurance laws, it is possible that RICO actions in Nevada thus could be held permissible even under the Sixth

scheme to defraud not inconsistent with insurance regulation), cert. denied, 342 U.S. 943 (1952).

[14] Nev. Rev. Stat. § 686A.310.2 (1997) might arguably authorize a private action if petitioners, through the alleged conduct, see pp. 4-5 & n.1, *supra*, "misrepresent[ed] to insureds * * * pertinent facts or policy provisions relating to any coverage at issue," in violation of Nev. Rev. Stat. § 686A.310.1(a).

and Eighth Circuit's approach—although the rationale would be quite different from that adopted by the Ninth Circuit in this case. See *Doe*, 107 F.3d at 1307 (RICO action impairs state regime because the "[S]tate of Minnesota has determined that its insurance market can best be regulated by the Commissioner's pursuit of fines and injunctive relief").

This does not, however, make the conflict in the circuits less than genuine: The Ninth Circuit in *Merchants Home*, *supra*, held that RICO actions are consistent with the McCarran-Ferguson Act in California notwithstanding the absence of a private right of action under California's insurance laws. See note 4, *supra*. Moreover, in our view, the results in *Kenty* and *Doe* appear to have turned on RICO's provision of treble damages rather than the fact that RICO (unlike state insurance law) makes a judicial forum available. See note 7, *supra*. Indeed, it is difficult to see why a State's failure to create a private right of action under its insurance laws should be thought to make a difference, especially where the State permits private litigants to obtain a judicial rather than administrative forum by bringing a common-law fraud action in state court. Nonetheless, the possibility that the result in this case could be the same under any circuit's approach is a consideration that weighs against granting certiorari. On balance, however, we believe that the conflict in the circuits is adequately presented here and warrants resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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